

STATE OF MICHIGAN
COURT OF APPEALS

TRIZEC NEW CENTER DEVELOPMENT,

Plaintiff-Appellee,

v

ASMAR DEVELOPMENT, INC.,

Defendant-Appellant,

and

ROBERT ASMAR,

Defendant.

UNPUBLISHED

August 16, 2002

No. 232591

Wayne Circuit Court

LC No. 00-014195-PZ

Before: Murray, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Defendant Asmar Development, Inc. appeals as of right from the trial court's order granting summary disposition in favor of plaintiff Trizec New Center Development. We affirm.

This appeal arises from an order granting plaintiff's motion for summary disposition, and effectively confirming an arbitration award. In August 1993, plaintiff and defendant entered into a five-year lease under which defendant, as tenant, operated a Burger King restaurant in the New Center One Building owned by plaintiff. During the lease, a number of disputes arose between the parties concerning tenant improvements, maintenance, and repair of the premises, which resulted in the parties entering into a settlement agreement (the agreement). Under the terms of the agreement, defendant had the option to vacate the premises by December 31, 1996. In the event that defendant vacated the premises by that date, it would be excused from any further payments under the lease. However, if defendant did not vacate the premises by December 31, 1996, all obligations under the lease continued until the end of the lease term, March 31, 1999. Further, as part of the agreement, Robert Asmar (Asmar) personally guaranteed the payment of defendant's rental obligations through the term of the lease.

Defendant did not vacate the premises by December 31, 1996, but continued occupancy of the space until March 31, 1998, leaving one full year of the lease term remaining. As a result, plaintiff sought recovery of unpaid rent and other related costs from defendant in a lawsuit filed in Wayne Circuit Court. Before the case came to trial, the parties agreed to settle their dispute by arbitration. In March 2000, the arbitrator rendered his opinion and award. The arbitrator found

defendant liable for unpaid rent and awarded plaintiff damages. The arbitrator further found Asmar personally liable for such damages as guarantor under the settlement agreement.

Thereafter, plaintiff filed a motion for summary disposition pursuant to MCR 2.116(C)(9) and (10) seeking confirmation of the arbitration award. At the same time, defendant filed an application to modify the arbitration award to correct a miscalculation of damages or to vacate the arbitration award on the grounds that the arbitrator failed to take an oath of office and exceeded his authority when he imposed liability on Asmar personally. The trial court granted plaintiff's motion, confirming the arbitration award, finding that under the arbitration agreement, Asmar agreed "to submit his liability as guarantor" to arbitration. The trial court further found that defendant was estopped from raising the arbitrator's failure to take an oath because defendant failed to object during the arbitration proceedings.¹ The trial court subsequently denied defendant's motion for reconsideration. This appeal followed.

Defendant first argues that the trial court erred in refusing to vacate the arbitration award entered against Asmar individually where the arbitrator exceeded the scope of his authority as determined by the arbitration agreement. We disagree. Judicial review of a binding arbitrator's award is strictly limited and the parties are conclusively bound by a binding arbitrator's decision. *Krist v Krist*, 246 Mich App 59, 66; 631 NW2d 53 (2001). The trial court shall vacate an arbitration award only upon a showing

that the award was procured by duress or fraud, that the arbitrator or another is guilty of corruption or misconduct that prejudiced the party's rights, that the arbitrator exceeded his powers, or that the arbitrator refused to hear material evidence, refused to postpone the hearing on a showing of sufficient cause, or conducted the hearing in a manner that substantially prejudiced a party's rights. [*Id.* at 66-67 (citations omitted); see also MCR 3.602.]

When a party challenges an arbitration award, a reviewing court may "(1) confirm the award, (2) vacate the award if obtained through fraud, duress, or other undue means, or (3) modify the award or correct errors that are apparent on the face of the award." *Id.* at 67.

Defendant argues that the arbitrator exceeded his authority because the scope of the arbitration agreement did not include any claims that plaintiff may have had against Asmar as a guarantor under the settlement agreement. Arbitrators derive their authority to act from the parties' arbitration agreement and are bound to act within those terms. *Id.* at 62. In this case, the arbitration agreement between the parties specifically stated that Asmar agreed to arbitration, individually and as guarantor of the settlement agreement. Thus, the arbitrator did not act beyond the terms of the arbitration agreement in determining Asmar's liability as guarantor under the settlement agreement. Further, the arbitration agreement is written in broad language to include all of the issues and grants the arbitrator authority to decide "all issues" relating to plaintiff's claims against defendant under the lease. Moreover, Asmar was also sued as an

¹ It appears the trial court addressed defendant's issue regarding the miscalculation of damages at the hearing on plaintiff's motion. However, the trial court's findings in regard to that issue are not contained in the record before this Court. Regardless, as detailed *infra*, such findings are not necessary to a resolution of defendant's issues on appeal.

individual in the lawsuit. Accordingly, the arbitrator did not exceed or disregard the scope of his authority in finding Asmar joint and severally liable with defendant for the amount of damages awarded plaintiff and “judicial review effectively ceases.” *Police Officers Ass’n of Michigan v Manistee Co*, 250 Mich App 339, 343; 645 NW2d 713 (2002) (citations omitted) (a court may only decide whether the arbitration award “draws its essence” from the contract); see also *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 498; 475 NW2d 704 (1991) (broad language contained in an arbitration clause to include all claims and disputes supports the conclusion that the arbitrator acted within the scope of authority).

Defendant next argues that the trial court erred in refusing to modify the arbitration award when the award contained a miscalculation of damages. We find no error. Claims that quarrel with a binding arbitrator’s factual findings or decision on the merits are not subject to appellate review. *Police Officers Ass’n of Michigan, supra*; *Krist, supra* at 67. However, an arbitration award may be modified or corrected but only if there is an evident miscalculation of figures or the award is imperfect in a matter of form, but the imperfection does not affect the merits of the controversy. *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 175; 550 NW2d 608 (1996), citing MCR 3.602(K)(1). Our Supreme Court has held that only those awards that contain an error discernable on the face of the award itself are reviewable and modifiable. *Krist, supra* at 67, citing *DAIIE v Gavin*, 416 Mich 407, 429; 331 NW2d 418 (1982). In this case, defendant’s claims of error regarding the calculation of damages require us to “go beyond the four corners of the document and dissect the arbitrator’s thought process to reveal an error.” *Id.* at 67 n 3. It is this type of error that is not evident without “scrutiny of intermediate mental indicia” that is not reviewable. *Id.* at 67. Because defendant’s alleged errors in the calculation of damages are not apparent on the face of the arbitration award, the arbitrator’s award must be confirmed. See *id.*

Last, defendant argues that the trial court erred in granting plaintiff’s motion for summary disposition and confirming the arbitration award where the arbitrator failed to take the oath of office as mandated by statute and court rule. We disagree. Absent a showing of fraud or that the arbitrator or another is guilty of corruption or misconduct that prejudiced the party’s rights or conducted the hearing in a way that substantially prejudiced a party’s rights, an arbitration award may not be vacated. *Krist, supra* at 66. Because defendant has failed to assert any permissible grounds for vacating the arbitration award, and the failure to take an oath of office alone is not enumerated as a ground to vacate an arbitration award, defendant’s issue is beyond the scope of appellate review.² See *Konal v Forlini*, 235 Mich App 69, 75; 596 NW2d 630 (1999). Accordingly, we decline to vacate or modify the binding arbitrator’s award.

Affirmed.

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald
/s/ Peter D. O’Connell

² Furthermore, this issue has not been properly presented for appellate review as defendant has given cursory treatment to the issue with little or no citation to relevant supporting authority for its argument. *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001).